Notre Dame Law Review

Volume 53 | Issue 1 Article 8

10-1-1977

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James M. Varga

DUE PROCESS AND THE INSANITY DEFENSE: EXAMINING SHIFTS IN THE BURDEN OF PERSUASION

I. Introduction

The United States Supreme Court has recognized the insanity defense for nearly one hundred years.[1] Currently, in approximately half the states, assertion of this defense does not affect the prosecution's burden of persuasion: the prosecution still must carry the burden of proof on the sanity issue.[2] In the remaining states, however, assertion of the insanity defense in a criminal proceeding carries with it the burden of persuasion on that issue.[3] A defendant who raises the defense in these jurisdictions must prove that he was insane at the time of the alleged crime. All of these states currently require that the defendant prove insanity by only a preponderance of the evidence.[4] The Supreme Court, however, has indicated that a state may raise this burden to proof beyond a reasonable doubt.[5]

In a recent decision, *Mullaney v. Wilbur*,[6] the United States Supreme Court cast doubt on any procedure that forces the defendant in a criminal trial to carry the burden of persuasion on a defense that he or she asserts. In *Mullaney,* the Supreme Court found unconstitutional a state statute that required the defendant to prove to a preponderance of the evidence that he had acted in the heat of passion on sudden provocation.[7] The Court recognized that due process violations could result from allocating this burden to the defendant; consequently, the Court required close examination of shifts in the burden of persuasion to the defendant.[8]

In *Mullaney,* the Court's examination of the shift in the burden of persuasion focused on the elements of the crime charged, or the facts necessary to establish guilt.[9] Traditionally, the prosecution has been required to carry the

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1 In Davis v. United States, 160 U.S. 469 (1895), the Supreme Court recognized the insanity defense which had been established in the landmark decision of M'Naghten's Case, 8 Eng. Rep. 718 (1843).

2 LAFAVE & SCOTT, CRIMINAL LAW § 40, at 313 (1972) [hereinafter cited as LAFAVE & SCOTT].

3 *Id.*

4 *Id.*

5 Leland v. Oregon, 343 U.S. 790 (1952). The statute establishing this allocation has since been repealed.

6 421 U.S. 684 (1975).

7 The trial court's instructions included the following explanations of the defense of heat of passion on sudden provocation:

> Heat of passion . . . means that at the time of the act the reason is disturbed or obscured by passion to an extent which might [make] ordinary men of fair, average disposition liable to act irrationally without due deliberation or reflection, and from passion rather than judgment.
>
> [H]eat of passion will not avail unless upon sudden provocation. Sudden means happening without previous notice or with very brief notice; coming unexpectedly, precipitated, or unlooked for . . . It is not every provocation, it is not every rage of passion that will reduce a killing from murder to manslaughter. The provocation must be of such a character and so close upon the act of killing, that for a moment the defendant could be considered as not being the master of his own understanding.

Id. at 687 nn.5&6.

8 421 U.S. at 702-03 n.31.

9 *Id.* at 698-99.

burden of persuasion on the elements.[10] Moreover, the standard of proof in criminal proceedings is higher than that required of the plaintiff in civil proceedings.[11] Proof beyond a reasonable doubt has long been an integral aspect of due process.[12]

According to the Court, the burden allocation in *Mullaney* violated due process. The state categorized the absence of heat of passion on sudden provocation as a fact not necessary to establish guilt[13] and imposed the burden of persuasion on this issue on the defendant.[14] State law, by shifting the burden of persuasion, thus recognized heat of passion on sudden provocation as an affirmative defense.

The defendant had sought to use this defense to avoid a conviction for murder. He had to prove this fact in order to establish the absence of malice.[15] The *Mullaney* Court, however, concluded that the defendant had in fact been required to disprove a criminal element.[16] The trial court had found the defendant guilty without requiring the prosecution to prove all the criminal elements.[17] The process had thereby stripped the defendant of his traditional presumption of innocence.

As part of its examination of the burden allocation, the *Mullaney* Court utilized the "interests approach," originally formulated in *In Re Winship*,[18] a case involving juvenile proceedings. In both cases, the Court examined the defendant's interest in the outcome of his or her trial and the interests of the community in that outcome to justify imposing on the prosecution the burden of persuasion beyond a reasonable doubt.[19]

The *Mullaney* rule, requiring close examination of shifts in the burden of persuasion, will doubtless be applied to the insanity defense. The Court did not specifically limit its warning to the defense of heat of passion on sudden provocation, but instead referred to any procedural device which shifts the burden of persuasion to the defendant. In a footnote, the Court stated that "the Due Process Clause demands more exacting standards before the state may require the defendant to bear this ultimate burden of persuasion."[20] In other words, if an exacting standard is not formulated to examine shifts in the burden of persuasion, the shift will be unconstitutional.

Furthermore, the application of the interests approach to an area of the law different from that in which it was first applied suggests future applications to still different areas, including the insanity defense. If a shift in the burden of persuasion on that issue does not satisfy an exacting standard, one which adequately protects the "interests" involved, the prosecution will be required to prove the defendant's sanity beyond a reasonable doubt.

10 McCormick, Evidence § 341 at 789-99 (1972).
11 *Id.*
12 *Id.*
13 421 U.S. at 696-97.
14 *Id.* at 691-92.
15 *Id.* at 699.
16 *Id.* at 698-99.
17 *Id.* at 701.
18 397 U.S. 358 (1969).
19 *Id.* at 363-64; 421 U.S. at 699-701.
20 *See* note 8 *supra.*

The extension of the *Mullaney* rule and the *Winship* rationale to the insanity defense would affect neither the federal courts nor the states that require the prosecution to carry the burden of persuasion after assertion of the insanity defense.[21] Doubt is cast, however, on the validity of standards that shift the burden of persuasion to the defendant on the insanity issue by requiring the defendant to prove his or her insanity beyond a reasonable doubt.[22] In addition, merely requiring the defendant to prove insanity by a preponderance of the evidence[23] might run afoul of the Supreme Court's recent warnings.[24]

This note maintains that due process is best protected by extending *Mullaney* to the insanity defense. In other words, the prosecution should carry the burden of persuasion on the insanity defense beyond a reasonable doubt until an exacting standard is formulated. The individual and societal interests implicated in such cases require an exacting standard and justify this result. In addition, this note criticizes approaches formerly used by the Supreme Court to examine the allocation of the burden of persuasion, as well as a recent attempt to devise an exacting standard to justify shifting this burden. The flaws in the past approaches and in the proposed standard also support the requirement, at least for the present, of proof by the prosecution to a reasonable doubt standard.

II. The Formal Elements Approach

A. *Conceptualism Based Upon Definitions*

A defense is "affirmative" if the burden of persuasion shifts to the defendant on the particular issue on which the defense rests.[25] Accordingly, insanity is an affirmative defense whenever the defendant must prove to a specified degree his or her insanity.

Presently, courts include under the heading of the insanity defense procedural devices which shift the burden of production.[26] Other courts permit shifts in both the burden of production and persuasion.[27] Under the formal elements approach, allocation of these burdens depends on an identification of the elements of a particular crime. For example, if sanity is classified as an element of guilt,[28] due process requires the prosecution prove the defendant's sanity beyond a reasonable doubt. In contrast, a state could classify sanity as a fact not necessary to establish guilt and thereby impose the burden of proof of insanity

21 *See* note 2 *supra.*

22 Such a standard is expressed in Leland v. Oregon, *supra* note 5. The *Leland* standard is questioned in Buzynski v. Oliver, 538 F.2d 6 (1st Cir. 1976) *cert. denied,* 429 U.S. 984 (1977). *See* text accompanying note 131 *infra.*

23 Though the *Buzynski* court criticized the degree of proof (reasonable doubt) required in the *Leland* case, it did not criticize the shift in the burden of persuasion and in fact permitted a shift by a preponderance of the evidence.

24 *See* text accompanying note 20 *supra.*

25 LAFAVE & SCOTT at 152.

26 The federal courts, pursuant to Davis v. United States, 160 U.S. 469, require the defendant only to carry the burden of production. *See* LAFAVE & SCOTT at 313.

27 Leland v. Oregon, 343 U.S. 790, and Buzynski v. Oliver, 538 F.2d 6.

28 In Davis v. United States, 160 U.S. 469, the Supreme Court treated sanity as an element by requiring the prosecution to prove the defendant's insanity beyond a reasonable doubt. *Davis* is discussed in text accompanying notes 45-51 *infra.*

on the defendant.[29] If insanity is thus classified as an affirmative defense, the defendant must carry not only the burden of production on the insanity issue but also the burden of persuasion. Improper classification of the insanity issue results in a misallocation of the burden of persuasion on the elements of guilt[30] and a violation of due process. The courts have taken different approaches to this constitutional problem.

In 1895, the Supreme Court approached the problem of shifts in the burden of persuasion on insanity from a perspective that focused on the formal classification of particular facts as elements of the crime charged.[31] The Court followed this approach as recently as 1952.[32] Under this formal elements approach, the elements of guilt are defined, and each party's relation to the elements and to the other issues in the case drawn. If an issue is classified as an element, the prosecution must prove the particular fact beyond a reasonable doubt. On other issues, defined as defenses, the defendant has the burden of production. Affirmative defenses, on the other hand, require the defendant to carry the burden of persuasion on the issue upon which the defense rests. A discussion of this approach therefore focuses on definitions (elements or defenses) and the relations drawn among the legal concepts (burdens of proof).

Courts have had difficulty applying this approach to the insanity defense. Two major views have developed that differ with regard to the asserted relationship between insanity and the elements of guilt.

In the first approach,[33] insanity is deemed to cancel an element of the crime, and thus to negate guilt. A defendant in a murder trial would offer evidence of insanity to show the absence of mens rea.[34] According to this rationale, a person who is insane cannot possess the mental state necessary to establish guilt, and cannot be held criminally responsible for his actions. This direct relationship between insanity, the elements, and guilt (cancellation and negation) requires the prosecution to carry the burden of persuasion on the insanity issue when the defendant properly raises the defense.[35]

In sharp contrast to this view, the second approach does not recognize a relationship between insanity and the elements of a crime. Rather, insanity is treated as a completely separate issue.[36] Under this approach, a defendant is first tried for murder without regard to the issue of sanity.[37] It is only after the determination of guilt that evidence of insanity may be presented, and then only as an excuse for criminal culpability.[38] Thus, insanity is used to excuse the conduct, *not* to negate the defendant's guilt.

The main difference between these two theories is the contrasting views concerning the conceptual relationship between the defense and the elements of the

29 This approach is followed in Leland v. Oregon, 343 U.S. 790. *Leland* is discussed in text accompanying notes 52-57 *infra*.
30 This constitutes the *Mullaney* Court's criticism of the statute involved in that case. *See* text accompanying notes 65-75 *infra*.
31 Davis v. United States, 160 U.S. 469.
32 Leland v. Oregon, 343 U.S. 790.
33 *See* note 28 *supra*.
34 For a case applying such an approach, *see* text accompanying notes 45-51 *infra*.
35 *See* note 27 *supra*.
36 For a case following such an approach, *see* text accompanying note 56 *infra*.
37 343 U.S. at 795-96.
38 *Id.*

crime. Dramatic differences in trial procedure result from the adoption of one of the positions.[39] Under either approach, the traditional presumption of sanity exists at the commencement of trial.[40] In any jurisdiction, this presumption can be rebutted by the defendant, provided that at a minimum he satisfies the burden of production on the insanity issue.[41] The first approach, which treats insanity as cancelling an element of the crime, supports the allocation of the burden of persuasion to the prosecution.[42] Since an insane individual is not criminally responsible, the prosecution must prove the sanity of the defendant to establish guilt, for the burden of persuasion as to all elements bearing on the question of guilt has traditionally been placed on the prosecution.[43]

The second view, however, supports the allocation of the burden of persuasion to the defendant.[44] If insanity is not perceived as cancelling an element, its introduction does not put an element of the crime at issue. Since the prosecution need only carry the burden of persuasion on the elements, the burden on the insanity question is left to the defendant.

By identifying the elements in a given case and setting the relationship which insanity bears to them, the formal elements approach thus attempts to provide a method to allocate the burden of persuasion. The obvious problem is that this approach may lead to two opposing conclusions.

B. *Davis v. United States* and *Leland v. Oregon*

The first notable application of the elements approach to the insanity issue occurred in *Davis v. United States*.[45] In this case, the defendant had been convicted in a federal court of committing a murder on Indian territory. The government's evidence clearly showed that the defendant had killed the victim.[46] The defendant, however, introduced evidence which brought into question his mental responsibility at the time of the alleged crime.[47]

The Supreme Court, announcing a rule to be followed in the federal courts, required the defendant to produce evidence sufficient to rebut the traditional presumption of sanity. Thus, the Court recognized that the sanity presumption

39 Procedural and dispositional disadvantages of an insanity plea are found in MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW: A FIELD STUDY, 37, 46 (1970) [hereinafter cited as MATTHEWS].

40 LAFAVE & SCOTT at 312.

41 Two views have developed concerning the amount of evidence necessary to satisfy the defendant's burden of production. According to the first approach, "some evidence" of insanity is sufficient to rebut the presumption of sanity. Fitts v. United States, 284 F.2d 108, 112 (10th Cir. 1960) (some evidence of insanity introduced by defendant obtains a directed verdict in the absence of the introduction of evidence of sanity by the government). In other jurisdictions, the defendant's evidence must raise a reasonable doubt of sanity. McDonald v. United States, 312 F.2d 847, 850 (D.C. Cir. 1962). *See* GOLDSTEIN, THE INSANITY DEFENSE 112-13 (1970).

According to the traditional view, introduction of the issue is left to the defendant. Evidence sufficient to raise the issue, however, may come from the prosecution. The prosecution has been allowed to raise the issue even over an objection by the defense. Lynch v. Overholser, 369 U.S. 705 (1962). *See* MATTHEWS at 38.

42 160 U.S. 469. *See* text accompanying notes 45-51 *infra*. *See also* LAFAVE & SCOTT at 48.

43 LAFAVE & SCOTT at 48.

44 343 U.S. 790. *See* text accompanying notes 52-57 *infra*.

45 160 U.S. 469.

46 *Id.* at 475.

47 *Id.*

relates only to the burden of production. Although the presumption requires the defendant to introduce evidence to provide a basis for a finding of insanity, the Court concluded that the burden of persuasion must remain on the prosecution. The Court based this conclusion upon the close relationship it drew between insanity and guilt.[48]

The *Davis* Court indicated its acceptance of the formal elements approach in the following passage:

> No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.[49]

According to the Supreme Court in *Davis,* although the burden of producing evidence of insanity is on the defendant, the prosecution can establish guilt only by proving the defendant's sanity beyond a reasonable doubt.[50] The defendant's guilt cannot be established if the jury has a reasonable doubt as to whether the defendant was legally capable of committing the crime.[51]

The second view of the elements approach is found in *Leland v. Oregon.*[52] In this case, Oregon law required the defendant to prove insanity beyond a reasonable doubt.[53] A special plea and verdict system helped to delineate between proof of the elements of the crime and proof of insanity.[54] Furthermore, the jury instructions clearly showed that the burden of persuasion on the elements always remained on the prosecution, while the defendant carried the burden of proving insanity beyond a reasonable doubt.[55] The defendant failed to persuade the jury on the insanity issue and was found guilty of first degree murder.

Justice Clark, writing for the majority, clearly outlined the application of the elements approach to the case: "[T]he burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State. . . . The jurors were to consider separately the issue of legal sanity *per se*—an issue set apart from the crime charged. . . ."[56] Thus, a clear delineation was made between the requisite elements of guilt and the issue of insanity.

In *Leland,* the insanity defense was viewed as having no significant relationship to the elements of the crime or to guilt. Accordingly, the majority in *Leland*

48 *Id.* at 487-88.
49 *Id.* at 493.
50 *Id.* at 487-88.
51 *Id.*
52 343 U.S. 790 (1952).
53 "When the commission of the act charged is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt. . . ." ORE. COMP. LAWS § 26-929 (1940) (since repealed). 343 U.S. at 792.
54 The special procedures are notice of the insanity defense (ORE. COMP. LAWS § 26-846) and verdict of not guilty by reason of insanity and consequent commitment (ORE. COMP. LAWS § 26-955 (1940)). 343 U.S. at 796 n.10.
55 [I]f you are satisfied beyond a reasonable doubt that the defendant killed her in the manner alleged in the indictment (or within the lesser degrees included therein), *then* you are consider the mental capacity of the defendant at the time the homicide is alleged to have been committed.
343 U.S. at 796 n.10 (emphasis supplied).
56 *Id.* at 795-96.

did not require the prosecution to prove the defendant's sanity. The Court allowed Oregon to force the defendant to prove his insanity beyond a reasonable doubt.

Justice Frankfurter dissented from the majority's analysis of the effects which this shift in the burden of persuasion has upon the defendant. He viewed the majority conclusion as "requiring the accused to prove beyond a reasonable doubt the absence of one of the essential elements for the commission of murder, namely, culpability for his muscular contraction."[57] Justice Frankfurter thereby adopted the *Davis* view that insanity has a relation to the elements and to guilt: it cancels an element and negates guilt. According to Justice Frankfurter, sanity should have been classified with the other elements of guilt and proven by the prosecution beyond a reasonable doubt.

The Supreme Court has thus permitted two contrary rulings on the insanity defense to stand. The federal rule announced in *Davis* requires the prosecution to prove the defendant's sanity beyond a reasonable doubt. In *Leland,* however, the Court permitted Oregon to require the defendant to prove his insanity beyond a reasonable doubt. These two cases indicate that the Court has in the past allowed courts and legislatures broad discretion, arguably too broad, in fashioning burden arrangements under the due process clause.

C. *Criticism*

Several problems inherent in the elements approach lead to confusion and possible contravention of due process. First, the concept of an element is too general and vague; when applied to facts, it is susceptible of conflicting interpretation. For instance, in *Leland,* Justice Clark defined the elements of the crime by excluding sanity,[58] whereas Justice Frankfurter treated sanity as an element necessary to establish guilt.[59] This conflict in interpretation is mirrored by the lower courts. The jurisdictions disagree concerning the allocation of the burden of persuasion.[60]

Such conflicting rulings concerning the burden of persuasion on the insanity issue are detrimental to the criminal justice system. As Justice Harlan stated for the majority in *Davis,* "[I]t is desirable that there be uniformity of rule in the administration of the criminal law in governments whose constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty."[61] The different views and rulings on the insanity defense have led to such confusion that some commentators have advocated the abolition of the defense.[62]

Not only does such confusion prevent uniformity in the administration of criminal law, but it may also result in the deprivation of due process. As pre-

57 *Id.* at 804-05 (dissenting opinion).
58 *See* text accompanying note 56 *supra.*
59 *See* text accompanying note 57 *supra.*
60 *See* text accompanying notes 2-5 *supra.*
61 160 U.S. at 488.
62 Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?* 72 YALE L. J. 853 (1963). *But see* Wales, *An Analysis of the proposal to "abolish" the Insanity Defense in S. 1: Squeezing a Lemon,* 124 U. PA. L.R. 687 (1976).

viously noted, due process requires the prosecution to prove each element of guilt beyond a reasonable doubt.[63] By redefining the elements of the crime, a legislature may unjustifiably mitigate this burden.[64] Under such a redefinition, the state would force the defendant to prove the absence of certain elements, rather than require the prosecution to prove them beyond a reasonable doubt. The abuses resulting from this application of the elements approach caused the Supreme Court recently to implement a different rationale when examining shifts in the burden of proof.

III. *Mullaney v. Wilbur:* Individual and Societal Interests

In *Mullaney v. Wilbur,*[65] the defendant was convicted of murder. Under Maine Law,[66] both manslaughter and murder require that the homicide be unlawful (without justification or excuse) and intentional.[67] Murder is distinguished from manslaughter by the element of malice aforethought.[68] The trial court instructed the jury that malice aforethought would be implied if the prosecution established that the homicide was intentional and unlawful.[69] The court further instructed that the defendant could negate this implication by proving by a fair preponderance of the evidence that he had acted in the heat of passion on sudden provocation.[70] By satisfying this burden of persuasion, the defendant could preclude a finding of malice aforethought.

Maine accomplished this allocation of the burden of proof by an unusual statutory scheme. Instead of classifying malice as an element of the crime of murder, state law categorized it as a factor bearing only on the appropriate punishment.[71] Under such a definition, the state could require an accused to prove defenses, such as heat of passion on sudden provocation, which would demonstrate that he had not acted with malice.[72]

The *Mullaney* Court found the statute invalid. The Court asserted that the state, by rearranging the concepts in the elements approach,[73] required the defendant to bear the burden of persuasion on the issue of malice.[74] This allocation, according to the Court, violated the defendant's right to due process since the prosecution was not required to prove the defendant's guilt beyond a reasonable doubt.[75]

63 *See* note 10 *supra.*
64 *See Mullaney* notes 65-75 *supra,* for discussion of the redefinition of the elements.
65 421 U.S. 684 (1975).
66 The Maine manslaughter statute is as follows:

> Whoever unlawfully Kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than twenty years.

ME. REV. STAT. tit. 17 § 2551. The Maine murder statute provides: "Whoever unlawfully Kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." ME. REV. STAT. tit. 17, § 2651. 421 U.S. at 686 n.3.
67 421 U.S. at 685.
68 *Id.* at 686.
69 *Id.*
70 *Id.*
71 *Id.* at 698-99.
72 *Id.* at 686.
73 *Id.* at 698.
74 *Id.* at 699.
75 *Id.* at 701.

In order to examine this shift in the burden of persuasion, the *Mullaney* Court replaced the elements approach with the interests approach developed in *In Re Winship.*[76] In *Winship,* the Supreme Court required the state to meet the reasonable doubt standard in juvenile proceedings. In doing so, the *Winship* Court rejected conceptual formalism for substance.[77] Instead of adhering to legislative and judicial constructions of criminal elements, the Court analyzed the effects which conviction has on the defendant and the community. The importance of these individual and societal interests justified imposition of the reasonable doubt standard on the prosecution.[78] These interests thus provide the guidelines used by the Court to determine the validity of shifting to the defendant the burden of proof on certain issues.

The Court referred to several such interests. First, the defendant is vitally interested in retaining his liberty.[79] Another important concern is the defendant's desire to avoid the stigma of conviction.[80] Furthermore, it is important to society as a whole that the system of criminal law merit the respect and confidence of the community.[81]

These interests of the defendant and the community in the effect of a conviction require close examination of the likely effect of a shift in the burden of persuasion. In formulating a method to determine invalid shifts in this burden, focus has now turned from the conceptual level of definitions to the actual effect of judicial decisions on the defendant and the community.

In *Mullaney,* the Supreme Court reached its decision by applying the *Winship* interests analysis. The *Mullaney* Court emphasized that the interests noted in *Winship* were implicated to a greater degree in the case before it.[82] For example, the range in sentencing was much broader in *Mullaney.*[83] Moreover, the stigma attached to conviction and the need for community confidence in the decision were greater, since a juvenile proceeding such as that in *Winship* is deemed benevolent in nature.[84]

Yet the allocation of the burden of persuasion in *Mullaney* gave these interests even less protection than they had received in *Winship.* In *Winship,* the prosecution had to satisfy the burden of persuasion to only a preponderance of the evidence, whereas in *Mullaney* the defendant was required to carry the burden of persuasion on his defense by a preponderance of the evidence.[85] Since the interests were stronger than those in *Winship,* the *Mullaney* Court analogously required the prosecution to prove the absence of heat of passion on sudden provocation.

Procedures that allocate to the defendant the burden of proof of insanity will likely be subjected to such close examination. As the *Mullaney* Court

76 397 U.S. 358 (1970).
77 421 U.S. at 699.
78 397 U.S. at 363-64.
79 *Id.* at 363.
80 *Id.*
81 *Id.* at 364.
82 421 U.S. at 700.
83 Petitioner in *Winship* faced an eighteen month sentence, with a possible extension of up to an additional four and one-half years. In *Mullaney,* respondent faced a sentence from a nominal fine to a mandatory life sentence. *Id.*
84 *Id.*
85 *Id.* at 700-01.

specifically warned: "[T]he Due Process Clause demands more exacting standards before the State may require a defendant to bear this ultimate burden of persuasion."[86] If legislatures and courts fail to formulate exacting standards to examine shifts involving the insanity defense, it is likely that the Supreme Court will require the prosecution to prove the defendant's sanity beyond a reasonable doubt.[87]

IV. The Ashford and Risinger Standard

A. *A Derived Standard*

Professors Ashford and Risinger have formulated a standard to examine the constitutionality of shifts in the burden of persuasion.[88] Their standard is derived from two standards formerly used to examine the constitutionality of presumptions in criminal cases: the comparative convenience test and the rational connection test.[89] As Ashford and Risinger point out, the defendant has in the past been required to carry the burden of production and persuasion under legal devices commonly labelled by the courts as "presumptions."[90] The two tests have been employed to examine shifts in each of these burdens.

When used to examine shifts in the burden of production, the comparative convenience test states that the defendant must rebut a presumption if shifting the burden would aid the prosecution without subjecting the defendant to hardship or oppression.[91] The rational connection test may be summarized as follows: if a rational connection exists between the facts proven and the fact to be presumed, due process requirements are generally satisfied.[92]

Tot v. United States[93] illustrates the application of these tests to a presumption which shifted the burden of persuasion. In this case, Tot, who had previously been convicted of a crime of violence, was found guilty of possessing a firearm and ammunition.[94] The statute in issue established two presumptions against the defendant. First, the statute contained the presumption that the article was received by him in interstate or foreign commerce.[95] Second, the receipt was pre-

86 *Id.* at 702-03 n.31.

87 On the basis of the *Winship* interest approach alone, LAFAVE & SCOTT believe the prosecution will have to prove sanity beyond a reasonable doubt. LAFAVE & SCOTT at 48.

88 Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L. J. 165, 190 (1969) [hereinafter cited as Ashford & Risinger].

89 Ashford & Risinger at 184, 190.

90 Ashford & Risinger at 166-67.

91 *See* Morrison v. California, 291 U.S. 82, 88-91 (1933), where the comparative convenience test was first formulated, *as quoted in* Ashford & Risinger at 167-68.

92 Ashford & Risinger at 165.

93 319 U.S. 463, 467 (1943). Ashford & Risinger refer to *Tot* as the best statement of the rational connection test.

94 In *Tot*, the validity of the following statute was at issue:

> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearms or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

15 U.S.C. § 902(f)(1961) (since repealed) *quoted in* 319 U.S. at 464.

95 319 U.S. at 466.

sumed to have occurred subsequent to the effective date of the statute.[96] Unless the defendant could disprove these presumptions beyond a reasonable doubt, these facts would be presumed to exist.

The Supreme Court concluded that convictions obtained through use of the presumption could not stand, since there was no rational relation between the facts proven by the government and the facts presumed by the statute.[97] The Court admitted that in most states a record of the purchase transaction or registration of ownership is required yet concluded that mere possession did not strongly indicate an interstate transaction.[98] For example, a number of states have no such laws, and transfer prior to adoption of the state regulation or intrastate transfer was possible.[99]

The *Tot* Court purported to make the comparative convenience test a corollary to the rational connection device.[100] According to the comparative convenience test, the defendant must carry the burden of persuasion on an issue whenever this would aid the prosecution without subjecting the defendant to hardship or oppression.[101] This comparative convenience test, according to the *Tot* Court, is not to be applied unless a rational connection is found between the proven facts and the presumed fact.[102] The Court found it impermissible to shift the burden of persuasion to the defendant by arbitrarily turning a fact, immaterial to guilt, into an occasion to force on the defendant the obligation of exculpation.[103] Thus, to apply the comparative convenience test thereafter, not only must the defendant have more convenient access to the proof and not be subjected to hardship if the burden is shifted, but the inference must now be a permissible, rational one.

B. *The Suggested Standard*

From these two tests, Ashford and Risinger attempt to establish a standard to examine the constitutionality of shifts in the burden of persuasion after the defendant asserts a defense.[104] The fundamental question in this standard is whether the shift in the burden of persuasion will result in the conviction of an unacceptably high percentage of innocent defendants.[105] Ashford and Risinger deem this question fundamental since they view "wrongful" conviction as the result most detrimental to a defendant's due process rights.[106]

To guard against this result, they formulate two more questions, the first of which specifically directs attention to a defendant's ability to escape conviction by proving an affirmative defense. The first question can be stated as follows: What percentage of insane defendants can prove the affirmative defense (in-

96 *Id.*
97 Without finding a rational connection, the Court reversed a conviction in one of the cases joined for hearing and affirmed the reversal of the conviction in the other case. *Id.* at 468.
98 *Id.*
99 *Id.*
100 *Id.* at 467-68.
101 *See* note 91 *supra.*
102 319 U.S. at 467-68.
103 *Id.* at 469.
104 *See* note 89 *supra.*
105 Ashford & Risinger at 190.
106 *See* Ashford & Risinger at 182-83, for the reasoning behind this rational connection.

sanity)?[107] The suggested percentage test examines the ability of the defendant to overcome the burden, as does the comparative convenience test. Unlike the latter test, however, the modified test focuses solely on the defendant's ability to overcome the burden:[108] the comparative convenience test also directs attention to prosecutorial hardship.[109] Thus, in their percentage test, the defendant is given more protection than under the comparative convenience test.

The second question can be stated as follows: What is the rational connection, or correlation, between the elements of the crime and the absence of the affirmative defense (sanity)?[110] As applied to the insanity issue, if, under a law, nearly all of the persons who commit the crime are sane, the connection between the criminals and sanity is deemed rational.[111]

To aid the courts to determine violations of due process arising from shifts in the burden of persuasion, Ashford and Risinger demand a reasonable doubt standard to examine these shifts.[112] If there is a reasonable doubt that a defendant who is in fact insane would be able to carry the burden, the shift to the defendant is improper. To provide a shorthand method of avoiding the subjective limitation of reasonable doubt, Ashford and Risinger employ percentages.[113] They assert that a reasonable doubt might not be found if, when the burden of persuasion is shifted to the defendant, one innocent defendant with ninety guilty would be convicted.[114] This answers the fundamental inquiry concerning wrongful conviction. Their percentage and rational connection questions are, likewise, converted into numerical formulae: (1) if nine out of ten defendants who committed the elements of the crime were sane, and (2) if nine out of ten defendants who committed the elements of the crime, but who were insane, could successfully overcome the shift in the burden of persuasion, then no reasonable doubt about the validity of the shift could be found.[115] Consequently, the shift in the burden of persuasion would be upheld.[116]

This suggested standard has already been applied by a court in an attempt to satisfy the *Mullaney* Court's demand for more exacting standards.[117] By requiring courts to pay greater attention to the ability of defendants to prove the defense, in addition to requiring a rational connection, this standard purportedly supplies an "exacting" standard.

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107 Ashford & Risinger at 190.
108 *Id.* at 184, 190.
109 *See* Ashford & Risinger at 184, 190, for a treatment of this prosecutorial hardship as only a threshold issue in the determination of whether a state interest exists to justify the shift in burdens.
110 *Id.* at 190. For purposes of identification, Ashford & Risinger's use of the symbols "A, B, X, and not-X" are replaced by their counterparts in legal terminology: "elements, affirmative defense, and absence of the affirmative defense."
111 *Id.* at 190.
112 *Id.* at 183.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 Buzynski v. Oliver, 538 F.2d 6 (1st Cir. 1976). *See* text accompanying notes 146-49 *infra*, for an application of the standard. *See* text accompanying note 153 *infra*, for a criticism of the standard's application.

C. *Criticism*

The Ashford and Risinger standard fails to supply courts with a more exacting standard to test the constitutionality of shifts in the burden of persuasion. First, their standard contains the conceptual problems inherent in the formal elements approach.[118] This results from their use of the formal elements approach as a basis for the rational connection test. The new standard examines the rational connection between the *elements* of the crime and the absence of the affirmative defense.[119] The uncertainty as to the nature of an element, expressed in the opposing views in *Davis* and *Leland*, pervades this test.[120] Difficulties would again arise if states were to redefine elements as defenses or as considerations of mitigation, as in *Mullaney*.[121] In sum, since an identification of elements —the crux of the criticism directed at the elements approach—is an inherent component of the rational connection test, its viability after *Mullaney* is doubtful. The *Mullaney* Court has found the elements approach insufficiently exact and, consequently, incapable of functioning alone as a standard to examine shifts in the burden of persuasion.[122]

In addition, Ashford and Risinger point out that the rational connection test has been used by courts to examine presumptions that shift only the burden of production and those that shift both that burden and the burden of persuasion.[123] Ashford and Risinger criticize this application of the rational connection test to different procedural devices.[124] They note that a defendant who must bear the burden of persuasion faces a much greater procedural disadvantage.[125] Accordingly, they demand a more discriminating standard to examine presumptions that shift the burden of persuasion.[126] Yet, they retain the amorphous "rational" connection as one test in their standard.[127] This vague concept is hardly an exacting constitutional standard.

Ashford and Risinger attempt to provide a remedy for these weaknesses in the rational connection test by joining the test with their percentage test.[128] With their standard, a court need no longer rely on the rational connection test. The procedural hardship on the defendant must also be examined in terms of percentages.

Two major objections can be raised against this percentage test. The first problem concerns the ability of Ashford and Risinger, or of anyone, to determine when a defendant has been wrongfully convicted. The jury system is the most practical method to determine guilt. Although jury error occurs, it is impossible

118 *See* text accompanying notes 65-75 *supra*, for a criticism of the formal elements approach.
119 *See* text accompanying note 110 *supra*.
120 *See* text accompanying notes 45-57 *supra*.
121 *See* text accompanying notes 65-75 *supra*.
122 *Id.*
123 Ashford & Risinger at 167.
124 *Id.* at 184-85.
125 *Id.* at 186-87.
126 *Id.* at 190-91.
127 In fact, Ashford & Risinger disagree over the importance of the rational connection test. One is of the opinion that the rational connection test can be reduced to an "inferential" connection. The other believes that the rational connection should be retained as a limiting factor on judicial discretion.
128 Ashford & Risinger at 185, 190.

to determine precisely which verdicts are valid and which are not.

Second, through the adoption of percentages, Ashford and Risinger divert attention from the particular defendant in each case. A constitutional standard should not assess how many or what portion of defendants shall be protected from loss of life or liberty. Rather, the standard should ensure that *all* defendants are protected. Ashford and Risinger's attempt to translate the subjective notion of reasonable doubt into percentages does not focus on the particular defendant at trial.[129] By justifying a shift in the burden of persuasion because most defendants fall into one category, Ashford and Risinger ignore the constitutional protections guaranteed to each individual defendant. On the critical issue of guilt, the defendant is being judged more on the basis of the characteristics of criminal defendants in *other* trials. Proper use of the reasonable doubt standard should focus on the doubt a juror would have with respect to the particular defendant at trial, not on the subjective notion of a generalized percentage.

Despite these flaws in the Ashford and Risinger standard, the United States Court of Appeals for the First Circuit recently applied it in *Buzynski v. Oliver.*[130] The *Buzynski* decision illustrates the difficulties a court would have in applying the standard.

V. One Step Forward, Two Steps Back

A. *Buzynski v. Oliver*

In the landmark decisions of *Winship* and *Mullaney,* the Supreme Court applied the interests approach to require the prosecution to prove the contested issue beyond a reasonable doubt. In *Buzynski v. Oliver,*[131] the First Circuit utilized the same approach. The court, however, refused to impose upon the prosecution the burden of persuasion on the sanity issue. In *Buzynski,* the court required the defendant to prove by a preponderance of the evidence the affirmative defense of insanity. Although the court applied the interests approach,[132] it rendered a decision clearly contrary to the results in the cases which originated and developed the approach, *Winship* and *Mullaney.* This contrary conclusion cannot be justified by the fact that *Buzynski* involved the insanity defense.

In *Buzynski,* the defendant was found guilty of robbery and arson at the first stage of a bifurcated trial.[133] In the second stage, the defendant presented evidence of insanity. Maine law required the defendant to prove insanity by a preponderance of the evidence.[134] The jury concluded that Buzynski had not satisfied this requirement. The state supreme court affirmed his conviction. The defendant then sought a federal writ of *habeas corpus.* The district court denied the petition, and Buzynski appealed.

The appeal focused on two points: (1) the allocation of the burden of persuasion to the defendant and (2) the constitutional effect of *Winship* and *Mullaney* on *Leland.*

129 *See* note 113 *supra.*
130 538 F.2d 6.
131 *Id.*
132 538 F.2d at 8.
133 *Id.* at 6-7.
134 *Id.* at 6.

In response to the defendant's first contention, the court noted that a unique hardship imposed upon the government can justify a shift in the burden of persuasion to the defendant.[135] One such interest advanced for purposes of argument by the *Buzynski* court is the unique hardship which disproof of an insanity defense, depending largely upon subjective behavioral criteria, would impose on the prosecution.[136]

The court, however, readily disposed of this hardship issue as did the *Mullaney* Court. In terms of the prosecutorial hardship found in proof of a subjective element, the court drew an analogy to mens rea. As the prosecution is required to prove mens rea beyond a reasonable doubt, so it has been argued that sanity should be proven by the prosecution beyond a reasonable doubt.[137] Both must be proved by reference to subjective criteria,[138] and the absence of either should prevent the imposition of criminal guilt.[139]

Moreover, the court classified this hardship as only a threshold issue and not as a determinative factor. The *Buzynski* court concluded that after the prosecution has raised the hardship issue, a court should examine the state's attempt to shift the burden of persuasion to the defendant.[140]

After disposing of the threshold issue, the court proceeded to the substance of the defendant's first contention, which concerned the constitutionality of the shift in the burden of persuasion. To examine the shift, the *Buzynski* court applied the *Mullaney* interests approach. In considering the affirmative defense of insanity, the court concluded that the effects on the accused and on the community "are as strong as, if not stronger than, those in either *Wilbur* or *Winship*."[141] In a criminal case involving an insanity defense, the individual's degree of guilt is not at issue, as it was in *Mullaney,* but criminal culpability is itself at issue.[142] One found not guilty by reason of insanity is not criminally responsible and should not bear the stigma of a criminal.[143] Though civil commitment is likely to follow for the insane defendant, the infringement upon the defendant's liberty is qualitatively different from that which follows imprisonment in a penal institution.[144] Moreover, the court reiterated that the community has an interest in the reliability of the criminal law, the application of which should leave no doubt that an insane person is not mistakenly found guilty and imprisoned.[145]

After examining the interests and noting the similarity between the interests in the case before it and in *Mullaney,* the court could have concluded that the shift was invalid. The basis for such a finding would have been the stronger interests noted by the *Buzynski* court respecting the insanity defense. Instead, the court adopted the Ashford and Risinger standard as the exacting standard demanded by *Mullaney.*[146] Application of this standard in *Buzynski,* according

135 *Id.* at 9.
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.* at 8.
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.* at 9.

to the court, demonstrated that Maine could justifiably shift the burden to the defendant.

Under the rational connection question, the court found a sufficient correlation between persons who commit crimes and their freedom from insanity to support the shift in the burden.[147] Under the percentage question, however, the court could not conclude beyond a reasonable doubt that insane defendants could prove their insanity by a preponderance of the evidence.[148] Despite this doubt, the court upheld Maine's shift in the burden of persuasion.

This deviation from the letter of the standard was perhaps based upon the difference between Maine's requirement of proof by a preponderance of the evidence and Ashford and Risinger's focus on shifts requiring proof beyond a reasonable doubt.[149] Since Maine required the defendant to assume the lesser burden of proof, the First Circuit apparently felt justified in allowing the shift despite its doubts as to the ability of defendants to meet the burden.

As to the defendant's contention that *Leland* was no longer viable, the court noted that a federal appellate court need not always follow a Supreme Court decision.[150] Yet, a stringent standard would have to be met: the court would have to conclude with "near certainty that only the occasion is needed" for the Supreme Court to strike down *Leland*.[151] Unable to reach such a conclusion,[152] the *Buzynski* court continued to recognize *Leland* as good law. Consequently, the court found Maine's procedure constitutional.

B. *Criticism*

Buzynski illustrates the difficulties involved in applying the Ashford and Risinger standard. With respect to the question whether an unacceptably high percentage of insane defendants could prove their insanity, the court concluded that it was "not at all sure that the [Supreme] Court would hold that a sufficiently high percentage of innocent criminal defendants would be able to carry the ultimate burden of persuasion, even if only by a preponderance."[153] In short, the court had a reasonable doubt.

147 The *Buzynski* court failed to apply the rational connection text with the required specificity. The court should have inquired into the sanity of persons who commit robbery and arson; not into the sanity of those who commit crimes in general. *Id.* at 10. *See* text accompanying note 111 *supra.*

148 *See* text accompanying note 153 *infra.*

149 The *Buzynski* court concludes that Ashford & Risinger objected to *Leland* (requiring a defendant to prove insanity beyond a reasonable doubt) only on the grounds of the degree of that burden, and that Ashford & Risinger "apparently did not object to a rule requiring a criminal defendant to bear the burden of persuasion on the question of his insanity." 538 F.2d at 9-10 n.6. Thus, the *Buzynski* court upholds a rule requiring the defendant to prove insanity by a preponderance of the evidence.

Ashford & Risinger's discussion of *Leland,* however, expresses no such definite commitment on shifts of the insanity defense to degrees of other than a reasonable doubt. They only contend that they "have been unable to think of a single legitimate interest of the state served by a defense entailing a standard of proof higher than proof to a preponderance of the evidence, which would also be served by that latter standard." Ashford & Risinger at 203. This statement contains a general position against shifts of any defenses by a reasonable doubt. The statement expresses no specific stance supporting shifts of the insanity defense by a preponderance of the evidence. As a result, the court's conclusion that Ashford & Risinger took a position on this issue is unfounded.

150 538 F.2d at 7.

151 *Id.*

152 *Id.* at 10.

153 *Id.*

This reasonable doubt causes confusion in the application of the standard. First, since the court relied upon the analysis of the Ashford and Risinger article,[154] the court's reasonable doubt should have prevented the shift under the percentage test. Despite Maine's procedure requiring only a preponderance of the evidence, the court still had a reasonable doubt as to whether a sufficient number of insane defendants could prove their insanity. Under the letter of their asserted standard, the shift should have been found violative of due process.

The *Buzynski* court also misapplied the rational connection test. This standard was transformed into a requirement that there be merely a "sufficient correlation" between defendants who have committed crimes and their freedom from insanity.[155] The general nature of this correlation renders it impotent as a limiting criterion. The correlation is simply too vague to satisfy due process requirements.[156]

Even if the standard had been properly applied, it fails to justify the burden allocation which the court sanctioned. Perhaps the *Buzynski* court was attempting to establish a compromise. Under this procedure, the defendant does not have to meet the reasonable doubt standard; the prosecution is also spared this burden. The rationale of past cases, however, undermines the validity of such a compromise. In *Davis,* the Supreme Court perceived a relationship between insanity and a criminal mental element which required the prosecution to prove sanity beyond a reasonable doubt. The *Mullaney* Court saw a similar relationship between heat of passion on sudden provocation and malice. The *Mullaney* Court also emphasized that the individual and community interests present in the case supported its decision requiring the prosecution to carry the burden of persuasion on the defense beyond a reasonable doubt. In *Buzynski,* the First Circuit recognized that even stronger interests are involved under the insanity defense than under heat of passion on sudden provocation. Because of these strong interests, and the relationship which insanity bears to the mental state required for conviction, the *Buzynski* court should have required the prosecution to prove the defendant's sanity beyond a reasonable doubt.

The Ashford and Risinger standard cannot justify a contrary result. The standard itself contains flaws. Moreover, the *Buzynski* court did not apply it precisely. The standard simply does not satisfy the *Mullaney* Court's demand for an exacting standard.

VI. Conclusion

Mullaney presents guidelines for the protection of due process. Due to the likely extension to the insanity defense of the interests approach advanced in *Mullaney,* the prosecution will be required to prove sanity beyond a reasonable doubt, unless the prosecution satisfies a rigid standard, one which adequately accounts for the interests specified in *Mullaney.* If the Supreme Court obtains

154 *See* note 146 *supra.*

155 *Id.* at 10. Since Ashford & Risinger disagree over the necessity of the rational connection test, a "sufficient correlation" might prove satisfactory for one of them. *See* note 127 *supra.*

156 Criticism of the rational connection test applies against a "sufficient correlation" with even greater force. *See* text accompanying notes 118-27 *supra.*

the opportunity to pass judgment on a shift in the burden of persuasion on the insanity issue, the Court should reject the Ashford and Risinger standard as the exacting standard required under *Mullaney* and rely upon the developing interests guidelines. As a consequence, *Leland* and *Buzynski* would be overruled. Only such action by the Court will clarify the present confusion surrounding the insanity defense. More importantly, only by such action can the Court assure due process.

James M. Varga

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